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Case No. 81-55

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

PAUL IRA FERBER,

Respondent.

On Petition For Writ Of Certiorari To
The New York State Court Of Appeals

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY CHARLES H KEATING, JR., AND CITIZENS FOR DECENCY THROUGH LAW, INC., AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONERS, THE PEOPLE OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY CHARLES H KEATING, JR., AND CITIZENS FOR DECENCY THROUGH LAW, INC., AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONERS, THE PEOPLE OF THE STATE OF NEW YORK	1
BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS	8
PROPOSITION OF LAW CHILD PORNOGRAPHY, AS DEFINED IN NEW YORK PENAL LAW SECTION 263.10(1), IS INHERENTLY OBSCENE AS A MATTER OF LAW AND IS UNPROTECTED BY THE FIRST AMENDMENT WITHOUT REGARD TO THE APPLICATION OF THE "MILLER TEST".	8
SUMMARY OF ARGUMENT	9
LAW AND ARGUMENT	10
A. Child Pornography Is Malum In Se And The Application Of The Miller Test Is Not Necessary To Protect Legitimate First Amendment Rights.	10

TABLE OF CONTENTS

Page

B. The New York Statutes, Taken As A Whole, Narrowly Define The Offense So As To Prohibit Only Inherently Obscene Child "Pornography" And Not Legitimate Works of Art Or Science. 22

CONCLUSION 29

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

Cases	Page
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	12
FCC v. Pacifica, 438 U.S. 726 (1978)	11,19, 20
Ginsberg v. New York 390 U.S. 629 (1968)	10,11, 26
Ginzburg v. United States, 383 U.S. 463 (1966)	27,28
Jacobellis v. Ohio, 378 U.S. 184 (1964)	28
Jenkins v. Georgia, 418 U.S. 153 (1974)	23,24, 26,
Memoirs v. Massachusetts, 383 U.S. 413 (1966)	14
Miller v. California, 413 U.S. 15 (1973)	10,13, 14,17, 22,25, 29
Mishkin v. New York, 383 U.S. 502 (1966)	26
Mitchum v. Florida, 251 So.2d 298 (Ct. App. Fla. 1971)	15

TABLE OF AUTHORITIES

Cases	Page
Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973)	11,17, 20
Roth v. United States, 354 U.S. 476 (1957)	13,14
Sewell v. Georgia, 435 U.S. 982 (1978)	17,18
Teal v. Georgia, 435 U.S. 989 (1978)	17

OTHER AUTHORITIES

Ballentine's Law Dictionary Third Edition (1969)	13

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Charles H Keating, Jr., and Citizens for Decency through Law, Inc., the Moving Parties herein, respectfully move this Honorable United States Supreme Court, pursuant to Court Rule

36, for leave to file a brief as Amici Curiae in support of the Petitioners. Consent was granted by Petitioners and respectfully denied by Respondent.

Moving Parties have a special and fervent interest in the subject matter of this appeal, having devoted considerable time, study, and effort to assisting federal and state law enforcement authorities over the past twenty years in the enforcement of laws regulating and combating the commercial exploitation of obscene materials within this country. Charles Keating is the founder and co-counsel for Citizens for Decency through Law, Inc., formerly Citizens for Decent Literature, Inc., an Ohio corporation with over one hundred thousand contributors and supporters and with chapter affiliates throughout the United States. Citizens for Decency through Law, Inc. (CDL), is a

non-profit, non-sectarian, and non-political organization with its national headquarters formerly located in Cleveland, Ohio, now located at 2331 W. Royal Palm Road, Phoenix, Arizona, formed for and dedicated to the support of effective and rational obscenity laws and the efforts of governing legislative bodies in the passage of obscenity legislation through public education, the dissemination of existing and proposed obscenity laws, and lending legal assistance to prosecutors and law enforcement personnel.

Moving Party was also a member of the Presidential Commission on Obscenity and Pornography. Responding to the opening statement of Public Law 90-100, "The Congress finds that the traffic in obscenity and pornography is a matter of national concern.", Moving Party authored and released his findings in

the "Report of Charles H Keating, Jr., Commissioner", which explained the workings of the Commission and the wealth of statistical information and human experiences which prove the relationship between the purveyance of obscenity to crimes and other anti-social behavior. (Report released September 30, 1970.)

That Moving Party's personal efforts, and those of CDL, are shared on a national level is evidenced by the membership of one hundred forty-six past and present members of Congress and state governors, as well as respected and dedicated clergy, educators, prosecutors, media personnel, and corporate officers, who join in the function and goals of CDL and Mr. Keating.

The extent of Moving Party's involvement in the actual enforcement of

obscenity laws is evidenced by his having been plaintiff on behalf of the state of Ohio in an obscenity nuisance abatement action which was affirmed by the Supreme Court of Ohio, State of Ohio, ex rel. Charles H Keating, Jr. v. A Motion Picture Film Entitled "Vixen", et al., 27 Ohio St.2d 278, 272 N.E.2d 137 (1971), affirmed on remand from this Court, 35 Ohio St.2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

Moving Party and CDL have also filed briefs amicus curiae in this Court urging that obscenity laws or convictions be upheld: Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 1333 (1964); Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 1052 (1966); Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31, 1079 (1966); Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 1082 (1966); Paris Adult Theatre I v.

Slaton, 413 U.S. 49, 37 L.Ed.2d 447, 1110 (1973); Heller v. New York, 413 U.S. 483, 37 L.Ed.2d 745, 1225 (1973); Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 1295 (1974); Marks v. United States, 430 U.S. 188, 51 L.Ed.2d 260 (1977); Splawn v. California, 431 U.S. 595, 52 L.Ed.2d 606, 883 (1977); and Vance v. Universal Amusement Co., 445 U.S. 308, 63 L.Ed.2d 413 (1980).

Furthermore and most recently, this attorney, Bruce Taylor, represented the Respondents, State of Ohio, in the case of Flynt v. Ohio, ___ U.S. ___, 68 L.Ed.2d 489 (1981).

Moving Parties hope to urge as amici that "child pornography" is inherently unprotected by the First Amendment, because it is "obscene" as a matter of law, and does not require the application of the "Miller Test" for regulation.

It is sincerely hoped that this Court will grant our Motion for Leave to File a Brief as Amici Curiae and allow us to participate in this cornerstone case which presents important issues for all the people of the United States as well as those of the State of New York.

Respectfully submitted,

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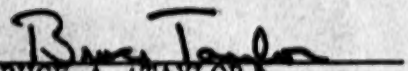
By: 

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PROPOSITION OF LAW

CHILD PORNOGRAPHY, AS DEFINED IN NEW YORK PENAL LAW SECTION 263.10(1), IS INHERENTLY OBSCENE AS A MATTER OF LAW AND IS UNPROTECTED BY THE FIRST AMENDMENT WITHOUT REGARD TO THE APPLICATION OF THE "MILLER TEST".

SUMMARY OF ARGUMENT

Amici respectfully submits to the consideration of this Court: (A) that child pornography should be viewed as malum in se and therefore inherently obscene and illegal; and (B) that these New York statutes only apply to those works which are truly pornographic and rightfully subject to such treatment.

The New York statutes, when read as a whole, proscribe a crime of dealing in child pornography which narrowly prohibits a certain malicious activity in a way which does not unconstitutionally restrict protected rights. These statutes can be read in a constitutional manner and, for the sake of a paramount interest in protecting children from abuse and exploitation, they must be so considered.

LAW AND ARGUMENT

A. Child Pornography Is Malum In Se And The Application Of The Miller Test Is Not Necessary To Protect Legitimate First Amendment Rights.

This Court has been faced with a "tortured history" of separating protected sexually oriented expression from the unprotected "crass commercial exploitation of sex". This Court has fashioned a test for prohibiting obscene matter for adult use in Miller v. California, 413 U.S. 15, at 24-25 (1973), and harmful matter for use by minors in Ginsberg v. New York, 390 U.S. 629 (1968). Child Pornography, however, is a new species, not previously contemplated under either of these tests, and requires the formulation of a new criterion specific unto itself. This task is more similar to the fashioning of the "indecency" standard

for radio and television which this Court dealt with in FCC v. Pacifica, 438 U.S. 726 (1978).

In Paris Adult Theatre v. Slaton, 413 U.S. 49, 57-64 (1973), this Court discussed the many concerns which legislatures and society may employ as a rational basis upon which to prohibit obscenity from the adult marketplace. In Ginsberg v. New York, supra at 636-43, the societal and governmental interests in guiding and protecting children were outlined and admitted to be a legitimate basis for the statutory treatment of what is harmful to minors as being in "rational relation to the objective of safeguarding such minors from harm". Id., at 643. The interest in protecting children from being used to perform for pornographic movies and magazines is obvious and virtually without contradiction. These reasons to

protect children from the porn makers and merchants are poignantly discussed by the Petitioner and by the Amicus Covenant House and need not be added to here. However, reference to the history of obscenity law shows that a new standard for child pornography is consistent with these concerns and interests and is supportable under our Constitution.

As stated in Chaplinsky v. New Hampshire, 315 U.S. 568, at 571-72 (1942):

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social

> interest in order and morality. . . .

This principle was relied upon for dealing with obscenity in Roth v. United States, 354 U.S. 476, at 485 (1957), and in Miller v. California, supra at 20, but also applies to this case. Child pornography is so hideous and intolerable that it is in a class by itself and subject to regulation as utterly without First Amendment protection.

The concept of being mala in se is well suited to child pornography, if anything in law should be. Ballentine's Law Dictionary properly summarizes this time tested concept at page 766 of its Third Edition (1969):

> Mala in se. Inherently wicked, naturally evil, as adjudged by the sense of a civilized community; illegal from the very nature of the transaction, upon principles of natural, moral, and public law; immoral in its nature and

> injurious in its consequences, without regard to the fact of its being noticed or punished by the law of the state. 21 Am J2d Crim L § 25.

The practical approach to obscenity taken in Roth, supra at 487, simply stated:

> Obscene material is material which deals with sex in a manner appealing to prurient interest.[20] . . . [20] I.e., material having a tendency to excite lustful thoughts.

It was obvious to this Court at that time that such material would certainly be unprotected by the Constitution. Indeed, as this Court noted in Miller, supra at 21; "Roth presumed 'obscenity' to be utterly without redeeming social importance". Not until later did it become an added requirement to prove this lack of value. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966). This change was thought necessary to protect what the Court felt

was a legitimate work of literature even though it was sexually explicit. This new stress on the "value" of a work, regardless of its pruriency or offensiveness, has understandably misled the New York Court of Appeals to feel compelled to hypothesize some potential value in child sexual acts in potential "non-obscene" sexual "performances".

A more rational approach is to uphold the New York statute as allowing for the finding that knowingly promoting a sexual performance by a child involves obscenity per se which can be found in the same way that courts take "judicial notice". An excellent analysis of this concept in obscenity law is found in Mitchum v. Florida, 251 So.2d 298 (Ct. App. Fla. 1971).

The Florida court in Mitchum acted on the idea that "Courts are presumed to know what everyone knows." and stated

that "photographs can be so obscene . . . that the fact is incontrovertible".

Application of the "Miller Test" would only serve to determine three guidelines, all virtually irrelevant to child pornography. Would it matter if a filmed act of intercourse by children has "a tendency to excite lustful thoughts"? Would anyone argue that such acts are "patently offensive"? Would reasonable men differ, including doctors or educators, as to whether such photographs are useful for the pursuit of science, education or even art? Science and education and art can certainly live without using children as subjects and models.

There are items, universally recognized to be intrinsically dangerous, that the law presumes harmful and imposes strict liability. Such a "common good" theory supports the

regulation of machine guns, explosives, nuclear capability, "Saturday night special" handguns, drugs, dildoes, and acts such as incest, "blue sky law" schemes, pollution, public indecency, and unfair trade practices. Many of these concepts were noted in Paris Adult Theatre, supra at 61-62, 64, 67; and Miller, supra at 36.

Particularly important to this analysis is this Court's approval of Georgia's sexual devices law. In Sewell v. Georgia, 435 U.S. 982 (1978) and Teal v. Georgia, 435 U.S. 989 (1978), this Court upheld, by dismissing those appeals "for want of a substantial federal question", the Georgia "obscene materials" Section 26-2101(c), which provides that, in addition to material covered in subsection (b), "any device designed or marketed as useful primarily for the stimulation of human genital

organs is obscene material under this section." (See: Sewell, supra, 435 U.S. 982, 56 L.Ed.2d 76, at 77.) This prohibition against sexual devices, such as dildoes and artificial vaginas, was applied and upheld as allowing such items to be treated as "obscene" per se and subject to prohibition without reference to the "Miller Test". No seriously legitimate use is meant for such devices which would outweigh the balance of interests in favor of preventing traffic in such inherently prurient and offensive items. Child pornography, as defined by the New York law and within its legislative intent, is certainly as inherently illegal as sexual "rubber goods". This Court should treat the knowing traffic in child pornography to be without Constitutional question in similar fashion. The few legitimate uses of

sexual devices, by physicians or therapists, etc., are protected under the scienter requirement to the same degree that any necessary uses of child sexual activity would be reserved for bona fide medical, scientific, or sociological purposes.

Child pornography is a class of material separate and distinct from "adult pornography" in the same way that "obscenity" is distinct from "indecency". In FCC v. Pacifica Foundation, 438 U.S. 726 (1978), this Court recognzied that: "The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting." Id., at 750. The resolution of this child pornography dilemma should follow the logic of Justice Sutherland and the Court in

Pacifica, at 750-51, where it was stated:

> [A] "nuisance may be merely a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard." . . . We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

The nuisance variables of time, place, and manner will still be part of the application of Section 263.15 because the crime must be knowingly committed and the film or picture must be clearly promoted as an act of sexual conduct by a child. As discussed further below in Part B, scienter and pandering are factors which intrinsically weigh heavily in the application of this law and the statute cannot be read "in a vacuum". As this Court stated in Paris Adult Theatre, supra at 63, quoting Justice Cardozo, "all laws in Western

civilization are 'guided by a robust common sense' . . .".

Child porn is so universally condemnable and useless that even conceivably honest uses would gladly be foregone for the sake of preventing the market for such a trade. Serious medical studies and motion picture production certainly want no part of the sexual buying and selling of children as prostituted sex models. The law and courts are doing no one any favors by striking down the best protection children have for the sake of allowing for some bizarre perceived uses by legitimate scientists and artists. The logic in the notion that society needs access to any form of child sexual performances is so remote in reason that it "demeans the grand conception of the First Amendment and its high purposes in

the historic struggle for freedom". Miller, supra at 34.

B. The New York Statutes, Taken As A Whole, Narrowly Define The Offense So As To Prohibit Only Inherently Obscene Child "Pornography" And Not Legitimate Works Of Art Or Science.

The offense of "Promoting a sexual performance by a child", provided for in Section 263.15, must be read in pari materia with the definitions in Section 263.00, and with the intended scope of the whole of Article 263. This Article provides for three crimes, all aimed at the same industry and its abuses. Section 263.05 outlaws the actual use of children "to engage in a sexual performance". Section 263.10 prohibits the knowing promotion of obscene material which shows such a performance. Section 263.15 also prohibits the knowing promotion of such a performance.

It is clear from a plain reading of these statutes on their faces, when taken as a whole and read in relation to each other, that Section 263.15 was not intended by the Legislature to apply to writings or drawings of child sexuality, even if "obscene" under a "Miller Test". It is not aimed at a movie which depicts a child watching someone else in a sex act, nor to a child being inferred as committing sexual conduct. It, therefore, would not apply to a movie, such as Carnal Knowledge, in which sexual conduct "is understood to be taking place" but where "the camera does not focus on the bodies of the actors at such times" and there "is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes". Jenkins v. Georgia, 418 U.S. 153, at 161 (1974).

This Statute would, therefore, not apply to Jody Foster's performance in the movie Taxi Driver, nor to Brooke Shields' in Pretty Baby or Blue Lagoon, since the camera never showed them doing any "sexual conduct" as defined in Section 263.00(3). Nor was such conduct even "Simulated" as defined in Section 263.00(6). Sex was admittedly intimated or supposed, but no more so than this Court found protected in Jenkins v. Georgia, supra. The law does not inhibit "legitimate" film making, and the First Amendment is applicable as far as it should be.

Nor is it reasonable for the Courts to attempt to invent "legitimate" uses or kinds of children performing intercourse or lewdly modeling their genitals before a camera. The Court of Appeals points to a perceived prohibition of "medical or educational

materials containing photographs of such acts" as an example of overbroad proscription of that which the Court apparently felt worthy of protection. Such a perception is not supported by the record in this case and the statute as applied by the District Attorney. It is reasonable to assume that the prosecutors and juries and reviewing courts would not seek to apply this statute to such uses, a presumption supported by past experience and future expectations. This question is better left to the wisdom expressed in Miller, supra at 25 and 26, that "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary" and that in "resolving the inevitably sensitive

questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide". See also: Jenkins v. Georgia, supra. We must be mindful of the interpretations placed on the element of scienter by the New York Courts which highly protect the application of all such laws to knowing violators. See Mishkin v. New York, 383 U.S. 502, at 510-12 (1966), and Ginsberg v. New York, 390 U.S. 629, at 643-44 (1968). The New York Court of Appeals interpreted the "vital element of scienter" as follows (See: Ginsberg, at 644):

> A reading of the statute as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent

but calculated purveyance of filth which is exorcised....

Consideration must also be given to the principle of "pandering" as relevant in a special way to child pornography under Section 263.15. In Ginzburg v. United States, 383 U.S. 463, at 466 (1966), this Court reviewed the materials involved in the context of "commerical exploitation of erotica solely for the sake of their prurient appeal", even though the federal statute does not contain such an element, nor an explicit knowledge requirement, nor sexual specificity, nor even a stated "test" of prurience. All these factors are presumed by this Court as matters of law and common sense statutory construction.

This Court, in Ginzburg v. U.S., supra, relied on a trial court record which clearly established a knowing and

calculated exploitation of sexual material which was not otherwise obscene even under the established "Roth Test". As stated in Ginzburg, at 466; "The record in that regard amply supports the decision of the trial judge that the mailing of all three publications offended the statute."

This practice of this Court in reviewing both state and federal convictions by looking to the mens rea of the defendant, rather than primarily at the material as a naked piece of evidence under a sterile "test", was a sound practice and gave both flexibility and Constitutional protection to those who either attempted to operate in good faith or maliciously exploited sexual acts. As stated by Chief Justice Warren in his dissent to Jacobellis v. Ohio, 378 U.S. 184, at 200 (1964), and

repeated by this Court in Miller, supra, 413 U.S., at 23, fn.5:

> For all the sound and fury that the Roth test has generated, it has not been proved unsound, and I believe that we should try to live with it--at least until a more satisfactory definition is evolved. No government--be it federal, state, or local--should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law, and we have attempted in the Roth case to provide such a rule.

CONCLUSION

The knowing promotion of a sexual performance by a child under Section 263.15 is both an inherently heinous crime and an act of pandering which allow the concepts of "variable obscenity" and "indecent nuisance" to treat child pornography distribution as a crime distinct from obscenity for

adults. The history of obscenity jurisprudence provides many rules of law which, when applied to this statute, dictate that this Court should conclude that Section 263.15 cannot be said to be unconstitutionally overbroad or vague. The New York Court of Appeals was misled in its interpretation of this Court's field of pornography decisions and the present case allows this Court to apply its decisions in a constitutional manner so as to uphold this statute.

If the jury was told that they could have imposed a greater penalty by finding the films obscene as well as child pornography, they undoubtedly would have done so. However, with both crimes providing for the same conviction, it is no wonder they chose to forego the added burden of

determining all the complicated facets of the "Miller Test". The jury recognized that the defendants were child pornographers and it mattered little to them that the films were also obscene. They knew the act was wrong, independent of "obscenity", and this Court should say that the law is, indeed, presumed to know what everyone knows. This Court should admit that child pornography is wrong because it is inherently obscene, indecent, a nuisance per se, and an unforgivable offense against society within the reach of New York's Section 263.15.

Maleficia non debent remanere impunita, et impunitas continuum affectum tribuit delinguenti. (Evil deeds ought not to remain unpunished, for impunity offers constant encouragement to the wrongdoer.)

Respectfully submitted,

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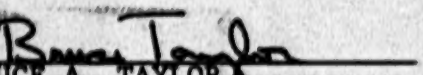
By: 
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